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ABSTRACT

A major constitutional issue in the twentieth century is the extent to which the U.S. Constitution should be interpreted to fit changing times and circumstances. In the latter part of the nineteenth century, the Supreme Court dispensed a "mechanical jurisprudence" based on an "objective" interpretation of the Constitution and the "original intent" of its authors. In the twentieth century, the Court has tended to respond to changing social conditions with flexible and expansive interpretations of basic constitutional principles. The "popular will" became a factor in decisions which has troubled "legal purists" who believe that the courts should be above public opinion as judges apply legal logic and precedents to reach their conclusions. The "purists" believe the task is not to keep the Constitution in tune with the times, but rather to keep the times in tune with the Constitution. In contrast, "pragmatic instrumentalists" believe that the Constitution must be interpreted to meet contemporary social concerns and problems, especially injustices suffered by minority groups. This view was articulated by two twentieth century Chief Justices of the Supreme Court: Harlan Fiske Stone (in the 1930's) and Earl Warren (in the 1950's and 1960's). During the 1970's and 1980's, there has been considerable tension between the "pragmatic instrumentalists" and the "legal purists." (JP)

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THE CONSTITUTION IN THE TWENTIETH CENTURY: IMPLICATIONS FOR CITIZENSHIP EDUCATION

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This paper was presented at the Symposium on THE CONSTITUTION AND NORTHWEST ORDINANCE IN THE EDUCATION OF CITIZENS, which was held on March 13, 1986 at Ball State University in Muncie, Indiana.

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In 1879, E.J. Phelps, President of the American Bar Association, declared: "the sacred Constitution should not be profaned by public discussion. It should not be hawked about the country, debated in the newspapers, discussed from the stump, elucidated by pot-house politicians and dunghill editors, or by scholars... who have never found leisure for the grace of English grammer or the embellishment of correct spelling."[1] Obviously the logic of the law could be discovered only by members of the bench and bar.

A few years later, Oliver Wendell Holmes, Jr. wrote: The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men, have had a good deal more to do that syllogism in determining the rules by which men should be governed."[2] Holmes' pronunciation was in a sense a statement that public law was public policy, and it was high time that was acknowledged. It was also a statement that the Supreme Court of the nineteenth century should quite dealing with the Constitution as a negative straitjacket, prescribing abstract rules to limit the use of legislative power for dealing with the concrete social problems of the day. It was time, Holmes, and others felt, that law ceased to be master of the people, and became their ser-

vant, with their concerns given new and serious consideration. Similar views came from political reformers, populists, early labor leaders, and more liberal members of congress and state legislatures.

With the assasination of President William McKinley, and the emergence of Theodore Roosevelt and his cry for a "new nationalism," the concept of law as a positive instrument for problem solving began to be accepted on many broad fronts. In fact, it became an important dimension of progressivism. This new view had broad implications for our three branch government. It imposed heavy obligations upon Presidents, congressmen and judges. If the Constitution was to become a positive instrument, who was to lead such a change and in what directions? And what were the courts to do with a century of negative governmental rulings that seemed to offer ominous threats to the success of such an important shift? Outcomes were constitutionally significant. Roosevelt, William Howard Taft, and Woodrow Wilson had little hesitation in redefining the office of the President so as to expand its authority in a variety of areas. Commission government emerged, and the executive branch swelled both in size and authrotity, as it extended federal control more and more into the lives of citizens. Further, Theodore Roosevelt made clear that he found the old jurisprudence of the nineteenth century distasteful. It "protected fossilized wrong," in his words. And he charged the pre-twentieth century Court with creating "a neutral area between the power of the states and the power of the federal government."[3] Such an assault on the judicial function subjected the judiciary to doubts, to reexaminations, and to severe questioning, but had the effect, at least to the mid-teens, of liberalizing its rulings generally, and modifying its former aggressive doctrine

of laissez faire constitutionalism.

Congress also, in this period, seized the initiative in terms of positive government. The Interstate Commerce Commission was strengthened through various congressional enactments. The anti-trust structure was beefed up with the Clayton Act (1914), and the creation of of the Federal Trade Commission (1914). And Congress also threw the gauntlet to the Court. Senator Albert Beveridge of Indiana, for example, demanded that the judges make of the Constitution "a living thing, growing with the people's growth... aiding the people in their struggle for life, liberty, and the pursuit of happiness."[4] Federal police power was born in this period. National social problems clearly exceeded successful state solutions. But to get Pure Food and Drug Acts, Meat Inspections Laws, Mann Acts, and federal narcotics legislation meant turning to a new broad interpretation of the commerce clause, and an acceptance of the role of the taxing power as one which could legitimately have progressive social implications.

All of this threw the ball to the Supreme Court which had little choice but to come to terms with such positive executive and legislative action. The body had suffered what G. Edward White has called a "crisis of legitimacy"[5] in the 1890s when it had imposed its will over that of the Congress and the state legislatures by maintaining that it was simply interpreting the document in an objective way -- dispensing a kind of "mechanical jurisprudence." By maintaining the oracular theory of judging, the justices had been discredited, thereby being identified with outmoded social and political attitudes. If fixed principles, time-honored precedents, received doctrines were to continue, the Court would have to demonstrate its ability to expand or contract under the pressures of time and circumstance.

The Court of the first fifteen years of the twentieth century responded. Further it rode out the crisis despite calls for such things as an end to judicial review, the recall of judicial decisions, and a broad drum beat of criticism of it reactionary orientation. And while one could hardly call the Court of those years "activist," its members did react to calls for a new "sociological jurisprudence," and find ways to condone legislation which, in a previous period, had generally been struck down. After all, two of the four constitutional amendments enacted and ratified in these years gave the people's will more opportunity for expression -- direct election of senators and woman suffrage. And when the Court in 1912 was faced with a state of Oregon constitutional amendment, allowing the people of the state the right of direct participation in the legislative process through the initiative and referendum, the Court maintained a hands-off attitude toward such democratic experiements, dismissing as a "political question" the contention that these reforms destroyed the republican form of government of the states.[6]

Further, as Benno Schmidt has pointed out in the latest volume of the History of the Supreme Court series, the Court in those early years even reflected a new civil rights sensitivity. It struck at the Grandfather Clause; used the Thirteenth Amendment to strike down state laws that supported peonage, by treating breach of labor contracts as criminal and by encouraging indigent defendants to avoid the chain gang by having employers pay their fines in return for commitments to involuntary servitude. It also found in the Fourteenth Amendment limits on the spread of laws requiring racial separation, and for the first time actually put some teeth in the equality side of the "separate but equal" doctrine. Thus, as Schmidt argues, the

body for the first time in American history opened itself in more than a passive way to the promises of the Civil War amendments.[7]

One further dimension of these years is worth brief comment. The nineteenth century had, on occasion, seen popular outbursts of anger at Supreme Court rulings, but principally for economic reasons not because federal or state social programs were being decimated. When in 1905, however, the Supreme Court threw out a New York state maximum hour law for bakers,[8] thereby overriding the expression of the people's will through their legislative body, and reading in the world "liberty" in the Fourteenth Amendment their own preference for laissez faire, large segments of the public were outraged. The severe criticism that greeted the Lochner decision seemed to confirm Holmes' contention, in dissent, that the case was "decided upon an economic theory which a large part of the country does not entertain."[9] As Mayor Gaynor of New York City put it: "There were no journeymen bakers that I know of clamoring for any such liberty."[10] The Justices, it was charged, were substituting their private preferences and private will for the rule of law; but were also telling the people's representatives they could not have the kind of laws that seemed humane to the majority.

Similarly, when the Court ruled the federal Child Labor Law unconstitutional in 1917,[11] many members of the public nodded with approval at Holmes' sharp dissent. There he stated: "if there is any matter upon which civilized countries have agreed, it is the evil of premature and excessive child labor. I should have thought, if we were to introduce our own moral conceptions where, in my opinion, they do not belong, this was preeminently a case for upholding the exercise of all of its power by the United States."[12]

The popular will thus became a factor in constitutional matters, and the closer government got to people's lives the more frequently such expressions were forthcoming. This aspect of constitutional development, however, has troubled legal purists through much of the twentieth century. For those who want to feel that the courts are above public opinion and simply the agents of a relentless logic, and a body of formal precedents that takes them automatically to certain kinds of conclusions, the injection of public demands poses a problem. For them, the task, as a recent neo-conservative writer has argued is not to keep the Constitution in tune with the times, but rather to keep the times in tune with the Constitution.[13]

The constitutional developments of the progressive period were reenacted in microcosm during World War I. Presidential leadership was aggressive and aggrandizing. Wilson established a virtual war-time dictatorship. Congress passed the sort of legislation that underwrote this development of super war-time control, adding to economic regulation, control over thought and expression.[14] And the courts to an extent followed suit, refusing to touch this expansion of federal authority during the war period, even though critics charged that the government was engaging in socialistic policies and represiveness in the area of free expression.

But when the post-war government plunged the nation in the "red scare" of 1920, the dangers of such excessive governmental authority came home sharply to many Americans. This, in turn, led to a sharp outpouring of public opinion wondering about the threat of government in terms of denying people basic rights, especially such civil liberties as free speech, free press, and fair trial. This attempt to claim constitutional rights supported by new organi-

zations like the American Civil Liberties Union produced concern among conservative leaders, and especially bar associations. Property rights were the proper concern of the Constitution. The rights of dissidents and minorities, not ready to accept the responsibilities of citizenship and support the system were hardly something to encourage by special protection.

In the reaction of the 1920s, the Constitution was dealt with by a majority of the conservative Court in a predictable fashion, returning frequently to older formulas and doctrines that underwrote earlier laissez faire views. Progressive era sociological jurisprudence was rejected. William Howard Taft's appointment as Chief Justice in 1921, "diminished the prospect," as William Swindler has written, "the the Court would be able to function as a living organ of the national will and not as an obstructive force of scholastic legalism."[15] Taft stated publicly that "the cornerstone of our civilization is the proper maintenance of the guarantees of the 14th and 5th amendments."[16] Translated into non-legal terms, this meant, for Taft, freeing men of property and talent from ill-guided restrictions on the creative use of that property. Specifically, this entailed legal undermining of dubious attempts at public regulation, and other forms of social control passed into law by the whim of capricious, socially irresponsible majorities. And Taft, assuming the Court would play this role consistently sought to strengthen the Court's discretion, and in lobbying ghrough the Judiciary Act of 1925,[17] gave the Court new powers as a constitutional interpreting instrument. But in largely reorganizing the federal judicial system in the belief that he could thus stem the rising tide of democracy, and make it a more effective safeguard of private property, to say

nothing of making the law a check against progressive ideas, he actually strengthened the body in such a way that he built a constitutional base for the judicial revolution of 1937 and a later welfare state a development he is no way foresaw.[18]

But before 1937, and especially with the catastrophic depression of 1929 and following, Taft's strategy worked wll, but in a fracturing way. Conservative property-oriented, strict-construction constitutionalism, bolstered by support from the business community, largely held sway with a majroity of the justices. But increasingly protest mounted from the underside of American society, labor, discontented agrarians, minorities, civil libertarians, who, in the words of one of their champions, Louis D. Brandeis, found painfully that the law of property was not an appropriate instrument for dealing with social unrest. Long before the election of Franklin D. Roosevelt, and the launching of his New Deal, gathering voices were calling for change.

Much has been written about the American legal realism movement. Troubled legal scholars in the law schools, but also on the bench, found the conservatism of the Supreme Court majority not only unacceptable, but essentially unproductive. Public cynicism regarding the Court as an objective speaker of abstract truth and logical policy was increasingly noticeable. Although Karl Llewellyn of the University of Chicago Law School was probably correct in seeing the realists not as an integrated school, but as an unintegrated movement, nonetheless the collective impact of their informed and mounting criticsm of the way the constitutional system was being interpreted, had the overall effect of calling attention to social needs and policy implications and preparing the ground for the introduction

on new kinds of materials on social relationships into the process of legal decision making.

Llewellyn, Jerome Frank, a Chicago corporation lawyer, Morris and Felix Cohen of C.C.N.Y., Thurman Arnold and Walton Hamilton at Yale, and Judge Benjamin Cardozo of the federal district court in New York emerged as leaders anxious to convert the idealism of an earlier day sociological jurisprudence into new forms of legal realism.[19] Such legalists, influenced by pragmatism, behaviorist psychology, psychoanalysis, and statistical sociology increasingly deplored the Supreme Court majority's emphasis upon rigid formulas and the applications of formal rules of law and sought rather to place emphasis on the role of the judge and his own psychological composition as a prime factor in judicial decision making. Judges, they contended, actually decided cases according to their own political and moral tastes, and then chose an appropriate legal rules as a rationalization. What was needed was a "scientific" approach that would fix on what judges do, rather than what they say, but also upon the actual impact of their decisions on the larger community.

Such a posture led them to criticize sharply the retrogressive economic and social sources of the predilections that led the Taft court majority to rule as it did. Such criticism intensified as the Court of the early 1930s seemed even more recalcitrant. It also led them to further reject the old oracular tradition of judging and to express skepticism about the degree to which American constitutional law was dealing with pressing social needs. If rules, principles, and doctrines were fictions, as they increasingly charged, and precedents merely examples of judicial lawmaking, all vestiges of oracular judging should be eliminated and the appellate judge should

start afresh, with empirical observation and a candid awareness of his own predilections serving as his primary relevant source materials along with a realistic awareness of societal realities. Public reaction to the discrepancy between New Deal programs and the Court's seemingly inherent hostility to them played further into this mix.

The New Deal of Franklin D. Roosevelt began on a note of constitutional broad construction. "Our Constitution," Roosevelt stated in his first inaugural address," is so simple and practical that it is possible always to meet extraordinary needs by changes in emphasis and arrangment without essential loss of form. That is why our constitutional system has proved itself the most superbly enduring mechanism the modern world has produced."[20] But from the beginning the President also sounded a note of warning. Anticipating traditional intrasigence, he suggested that should stalemate arise in the securing of essential national programs, he was prepared to ask Congress for "broad executive power to wage a war against the emergency, as great as the power as if we were invaded by a foreign foe."[21] That sentiment, which produced the biggest demonstration during the address, constituted a commitment of massive activism that Roosevelt quickly made clear he fully intended to honor.

The resultant years saw an outpouring of legislation from Congress unprecedented in American history. Such legislation impacted strongly upon industry, and labor, agriculture, housing, wages and hours, the welfare of the elderly, the needs of the unemployed and generally resulted in a regulatory state out to guarantee the public's interest through active government participation. Implicit in much of the legislation was the assumption that constitutional responsibility lay not only upon the courts, but the Congress had its responsibilities

as well, and that it might take, for political rules, its own principles, even though they were often divergent from those which the conservative majority of the Supreme Court embraced. This view came to be encapsulated in Roosevelt's statement regarding the enactment of the Bituminous Coal Act in 1935, when he wrote to the committee framing the legislation: "I hope your committee will not permit doubts as to constitutionality however reasonable to block the suggested legislation."[22] Those conservative opponents who were shocked by such a statement, were obviously imbued with the concept that the function of making principled decisions on matters of public policy lay wholly with the Court, and they tended to argue publicly that that was not only the Court's prerogative, but that once the Court had acted, that no one, President, or Congress should have the temerity to question it or the principles on which it based its rulings. Such a view entailed a deep bow in the direction of judicial activism, and in the direction that the Court should be the primary agency to impose principled judgments on the people. It would have been far more persuasive at the time had the principles that the Court was demanding not been such transparent reflections of a political view and ideology, wholly out of tune with what the populace of the 1930s felt was the appropriate position regarding public needs at that time.

Criticism did not come solely from Democratic politicians. When the "four horsemen," plus Hughes and Roberts threw out the Agricultural Adjustment Act of 1933 on narrow taxing power grounds and maintained that this was a virtually automatic conclusion (the Court in constitutional litigation "has only one duty -- to lay the Article

of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former."[23])

Justice Harlan Fiske Stone exploded in his dissent that "courts are not the only agencies of government that must be assumed to have capacity to govern."[24] He thus sounded an ominous warning against further abuse of judicial power and called for restoration of legal realism based upon responsible judicial self-restraint. But from a practical standpoint, that decision, plus others throwing out major New Deal programs created more than simply doctrinal problems. As political scientist David Minor wrote, these decisions manifested little concern for any possible alternative. "They failed quite deliberately to come to terms with the proper scope of political authority." All one learned from such rulings was the precise nature of the commerce and taxing power, and the dead areas of the Constitution -- the lacunae in which no power existed either state or national to deal with the problems of government. "They revealed virturally nothing of the extent to which the electorate could use its supposedly democratic authority to control and share society."[25] As the legal realist Dean of the University of Wisconsin Law School, Lloyd K. Garrison pointed out at the time, "what we face now is not how government functions should be shared, but whether in substance we shall govern at all."

That fact was underlined as the Court continued to question the new body of post-1935 legislation often referred to as the "second New Deal," setting itself up to exorcise this latest heresy from t he statute books. This action, in face of the fact that Roosevelt carried 46 of the 48 states in a landslide victory in 1936, grew in-

creasingly troublesome. Now confirmation seemed to exist for the allegation that the legal realists had been making for the previous decade -- that judges made law; that political and social predilictions were a central component of judicial decisions making, and that the Constitution contained ambiguities not absolute truths, and that the process of judging was one of temporarily choosing among competing principles, more than one of declaring the law for all times.

Roosevelt in lauching his Supreme Court packing plan, however, certainly exaggerated the degree to which that perception was embraced by Americans. His hope of separating the concept that it was the composition of this particular court, not the Constitution itself, that was the obstacle to New Deal success clearly underestimated the degree to blind symbolic adherence there was to both the court and the Constitution as stable symbols in unstable times.

Roosevelt's reaction to this immediate defeat was to a degree political and ideological. The President sought to channel his pique didactically. He was particularly anxious to draw a distinction between what he conceived as a lawyer's constitution and a people's constitution. In a speech on Constitution Day in September, 1937, he stated:

> The Constitution of the United States was a layman's document not a lawyer's contract. Madison, Washington and Franklin were not mainly lawyers... The lawyers of no political party, mine or any other, have had a consistent and unblemished record. But the lay rank and file of political parties has had a consistent record. Unlike some lawyers they have respected as sacred all branches of their government. They have seen nothing more sacred about one branch than about either of the others.
>
> The people and the parties have considered as most sacred the concrete welfare of the generation of the day. And with layman's common sense of what government is for, they have demanded that all three branches be efficient, that all three work together to meet the living generation's expectations of government. This government refuses to forget that the Bill

> of Rights was put into the Constitution not only to protect minorities against the intolerance of majorities, but also to protect majorities against the enthronement of minorities.[27]

As James M. Burns has pointed out, Roosevelt was here summoning up a party constitution as his great balance wheel against what he was now calling a lawyer's constitution.[28]

The Supreme Court seemed, grudgingly, to be listening to some extent. The "Constitutional Revolution" of 1937, involving the famous "switch in time that saved nine," saw the Court finding new constitutional ways to condone and underwrite the positive government which the President and a supportive Congress had put in place and the people had presumably voted for. New broad constructionist interpretations of the commerce clause and of federal taxing power, combined with a scuttling of liberty of contract, and the rejection of economic due process at the state level now seemed to insure sympathetic judicial treatment of both federal and state regulatory legislation. The Court now seemed willing to endorse the politico-constitutional strategy of the Roosevelt administration which embraced the idea of government-regulated free market competition and involved national policy made by independent regulatory agencies and administrative bodies. The result in practice was a type of interest-group pluralism with the President promoting the interests of different groups in an attempt to create a productive equalibrium within the economy. Compared to the corporatist, collectivist systems of Europe at the time, this approach allowed for considerable fragmentation and decentralization of governmental authority and even at times saw executive agencies and regulatory bodies working at cross purposes. Nonetheless, the result was to centralize policy-making power in the federal government, even though this was not

necessarily done at the expense of the states, whose power also grew at the time as did various intergovernmental programs of cooperation between state and national authority. The states thus shared in the general expansion of government produced by the economic crisis of the 1930's, with the Supreme Court condoning such action as a legitimate use of local authority to deal with special state and in some cases regional problems.

The effect at the time was for the Court to take a temporary back seat, with judicial power weakened and temporarily eclipsed. The Court stopped declaring unconstitutional acts of congress and state legislatures, and in the famous case of Erie Railroad v. Thompson,[29] deprived the federal judiciary of further authority, Justice Brandeis maintaining that there was no federal common law, and that the Court must rein in its power particularly in the areas of federalism and economic regulation.

This raised difficult questions as to what the future role of the body was to be. Roosevelt had now been acceeded broad authority and had a massive mandate for positive government to attempt to extract the United States from the depression and to impose needed regulation in the public interest. But the same public was increasingly aware of the overseas models of the modern centralized state than threatening the world, whether they be German National Socialism, Italian Fascism, Russian Communism, or Japanese militarism. American positive government, someway had to respect the rights and guarantee the liberties of the American people as part of its overall function. Minority rights had, from the days of Thomas Jefferson been allegedly the responsibility of the Supreme Court. And the Constitution embodied a view of liberty which entailed the protection of

individual rights against all government encroachment, but particularly encroachment by legislative bodies. Therefore, it is not surprising, given the people's acceptance of strong central government, and the expectations which they had for it, that certain Court members began early to explore the most constructive, and at the same time judicially defensible avenues for accepting those responsibilities.

Here it is vital to have a close and deep look at Harlan Fiske Stone, in many ways the architect of a new jurisprudence. As the 1930s had progressed, Stone had become increasingly concerned that the Court was not playing a positive and constructive role in the society of that period. He had initially resisted strongly the use of social theory as a test for the effectiveness of judicial decisions. But he came to accept the idea that in declaring law, judges must envision the social utility of the rule which they created. Law was an evolutionary process. Theories of social justice did play a part in determining how socially useful an existing legal document was. Thus Stone came to embrace the idea that currently held beliefs were a valid part of the evidence to be used in adjudication. Judges had a responsiblity to make delicate political adjustments between competing social values. Courts and judges should clearly be capable of utilizing a degree of creativity and be sensitive to political compromise. But one had to accommodate personal flexibility with institutional constraint. This meant that judges should be free to ignore and modify precedents if faced with unanticipated exegencies that made suspect the continued viability of such precedents. On the other hand, Stone believed that Justices should be prepared to justify their modification by appeal to reason, so that the de-

cision to change the state of the law appeared to have been made on other than ad hoc grounds. His trade-off, then, was between pragmatic accommodation and fidelity to an institutional idea of rationality, consistency and tradition. Judges should exercise power, but with a sense of institutional and intellectual limitations that accompanied such exercise. In this regard the judge had a deep obligation to search for the overriding purposes of laws, which could be found in cases involving statutory interpretation, in the words and actions of legislators, in constitutional cases, in the language of the Constitution itself as disclosed through judicial interpretation.

Stone then went on to articulate different standards for judicial review of legislation in accordance with the character of the interests invaded. In his later to become famous Carolene Products footnote of 1938,[30] which has been called "the manifesto in a footnote,"[31] he suggested that the presumption of constitutionality of legislation might be given a narrower scope where civil liberties interests were involved than where economic interests were infringed. Thus, especially where the legislative decision had been made without consent of the groups or interests which it affected, the Court had a responsibility to step in and exercise closer scrutiny of legislation. In such cases, the judiciary should place itself in a quasi-legislative position, and Stone indicated that certain rights, particularly, deserved special protection, especially those involving access to the political process, something often denied "discreet and insular minorities." He thus suggested what John Hart Ely has called "representation-reenforcing" action as a legitimate form of judicial activism.[32] Overall, what he was calling for was for the Court to take on the duty of assessing carefully and critically the legitimacy of laws res-

stricting civil liberties and civil rights.

The cumulative result, over the years, of this new direction was to lead the Court to a type of constitutional interpretation that more and more underwrote the claims of minorities against majority views as expressed through legislative and executive enforcement of the law. Conservative commentators at the time were seriously concerned. They felt this new relativism, realism, and pragmatism of those who maintained that open and free participation in the democratic process would result in people balancing their evil temptations against those of their neighbors, with the public interest eventually served as a result, was a recipe for trouble. Minorities may have been "discreet and insular" but such conservative moralists felt that this did not assure that they were responsible. Giving them rights which they could not handle, and removing restrictions to people's immoral impulses would inevitably result in giving vent to their evil tendencies.[33] Further, the concept that judges should rely on their intuitive senses of fairness and justice, rather than upon rigid, traditional, doctrinal rules seemed too subjective to such critics for whom law was principally restrictive, and a brake on irresponsible social pressures and popular demands. Translated into concrete political reality, this meant that such people saw the Constitution as essentially a conservative document, properly wary of big labor, inhospitable to social and economic experimentation, attached to existing racial practices and sex roles, suspicious of foreign creeds, favorably inclined toward a balanced budget and a sound dollar, and ill disposed toward dealing with collectivism in any form.

In the years from the late 1930s to the 1950s, this tension between the pragmatic instrumentalists and the conservative tradition-

alists was reflected in much of the behavior of the Supreme Court under Chief Justices Stone and Fred Vinson. The Court in those years, although filled with Roosevelt appointees, split sharply between activists and advocates of self-restraint, with the restrainers by and large prevailing, whether that involved condoning the relocation of Japanese-Americans during World War II, sustaining the government's loyalty program of the late 1940s and early 1950s, or resisting head-on confrontation with the old "separate but equal" rule in the area of festering race relations, especially in the American south.

But following the appointment of Earl Warren to the Chief Justiceship in 1953, the balance sheet shifted. The majority now moved far more toward the Stone view and toward increasing judicial concern for finding ways to deal with a range of explosive social problems. These included civil rights questions, from voting to desegregation, civil liberties issues, particularly in connection with speech, press, and religion, reappportionment challenges, a national concern for improving the quality of criminal justice, specially at the state and local level and a far too late acknowledgement that women had valid constitutional rights claims against the state, as well as against private discriminatory actions, economic, political and social.

The Warren Court in taking cases in all these areas presided over a further constitutional revolution.[34] Its very assertiveness, some would say overeagerness, plus the direct personal impact that its rulings had on myriad of Americans, once against raised questions about the proper constitutional role of the judiciary in the American governmental and legal structure.

The resultant rights revolution of the 1950s and 1960s had both its champions and it critics. Liberals hailed the Court for

its creativity and for modernizing the Constitution and turning it into an instrument for the achievement of social justice, especially for minority Americans previously denied political, social and economic equality. In turn they condoned a "result-oriented" jurisprudence wherein precedent was downgraded, and doctrinal consistency was sublimated to desirable outcomes. Conservative charges, that the Court was entering areas better left to elected legislative bodies, were answered by pointing to the legal realities of the time.

Meaningful racial intergration of public schools, and other public facilities, they declared, could not be achieved until the "separate but equal" gloss on the equal protection clause of the Fourteenth Amendment was removed. This was a task for the courts. Neither was Congress the agent to strike at the use of local laws and regulations "interpreted" by local law-enforcement officials in such a way as to harrass and intimidate local minorities and reform groups seeking a new level of individual rights. Similarly, the national legislature could not solve the problem of rural domination of state legislatures, nor were rural legislators about to vote themselves out of power. And while Congress could act in the voting rights area, it was clear in the 1950s that it would not do so until pressure was so strong that it had no choice. In like fashion, neither Congress nor the executive was the agent to reinterpret the meaning of the Constitutional guarantees of the Bill of Rights and apply them to states and cities in such a way as to produce uniform national standards of criminal procedure, or to supervise the administration of criminal justice in federal and state courts. In the religious area, the First Amendment on its face prohibited congressional action in the form of protection for unpopular religious minorities or individuals

as did reinterpretation of speech and press freedom, leaving the judiciary the only practical agency for affording relief from the arbitrary power of local censors of the reading and viewing tastes of the community.

To the critics charge that the Court's actions involved making new law, often out of whole cloth, its pragmatic defenders contended that the kind of cases reaching the Court in the Warren years did not lend themselves to traditional types of adjudication. The Court with more and more ordinary policy decisions being made by administrators was getting the "trouble" or "pathological" or "no-law" cases.[35] The reason was because no readily ascertainable legal rules were available to satisfactorily dispose of the issues elsewhere in government. Since there was thus no law to be discovered, the Court was obligated to make its own, by balancing the interests of competing parties involved in difficult and frequently novel modern conflicts, but conflicts that still demanded constitutional solutions. Further such defenders contended that under these circumstances, the Court's clear obligation was not to concern itself with abstract legal standards, but with the effects of given decisions and the attempt to make those effects an application, in broad principle, of the goals and values of American society.

Here the Chief Justice's position was revealing, even if shocking to traditionalists. "A legal system," Warren argued, "is simply a mature and sophisticated attempt, never perfected, to institutionalize a sense of justice and to free men from the terror and unpredictability of arbitrary force."[36] The Constitution, to him, embodied an ethical structure and his job was to apply the standards. This meant discovering applicable principles in the Constitution and turn-

ing them into instruments for the immediate achievement of social justice, especially passing on a better Bill of Rights, "burnished by growing use." If these rights were real, they needed constant and imaginative application to new situations, and his Court would see to it that "that most precious part of our legal heritage would be tested and retested."[37]

But as time went on, and a conservative reaction developed in the country, the Warren Court's view of the Constitution came to take on the form of a political issue. The right wing John Birch Society had early called for his impeachment. Barry Goldwater ran against the Court in 1964, denouncing its rulings and deploring the idea of government by judiciary. Richard Nixon vowed to appoint to the Court only strict-constructionists who would take the country back to the Constitution again. Ronald Reagan, more specifically vowed to reverse the Court's rulings in areas regarding prayer in the schools, busing to achieve integregation, affirmative action programs, and abortion. Various journalistic and scholarly supporters argued strongly for everything from curtailing the jurisdiction of the Supreme Court, to appointing conservatives to the body who would respect the strict-constructionism of an earlier day, to returning to the original intent of the founding fathers, which, they assumed would necessitate reversal of most of the Warren Court's "illegitimate gloss on the Constitution."[38] More moderate critics suggested that judges should confine their involvement with social issues to those areas susceptible to reasoned analysis by a court. Some social problems, they argued, did not admit of rational judicial solution. They were political or legislative in their nature. Particularly explosive social issues, they argued, might better remain unresolved if they

were not cabale of judicial consideration, even when another branch of government did not attempt to resolve them.

All such developments impact upon us as citizens. First, we have a serious obligation to understand what has happened constitutionally in this country in our times, and question seriously both the champions of the Court, and its critics. We also have an obligation to express our own opinions about what has happened in central pulic policy areas. The Constitution is not in any way the sole property of the Supreme Court, nor for that matter is it the sole property of lawyers and the bar. The Supreme Court, as Mr. Dooley said many years ago, "follows the election returns." But unless those returns are fairly clear in their statements, the Court has trouble reading our message. The Burger Court is a good case in point.[39] Conservative in "law-and-order" matters, the Burger Court nonetheless used its authority actively to modify certain criminal justice rulings of the Warren years. Further despite conservative criticism, it sustained affirmative action programs, both in higher education, and in the general employment area. And while it cut down on "entitlement" and welfare rights, it nonetheless continued to defend racial minorities, and sustain system wide busing orders, unless flagrantly irregular. Its early response to women's rights cases was so positive that it went, so its critics charged, too far in guaranteeing women new rights, and especially the right of abortion. But although the Justices have returned somewhat to their storm cellar after a barrage of attacks in this field, the Court has not backed down in the abortion area, even in more recent times when President Reagan and the right have kept a steady drum beat of criticism going against it. Possibly the fact that the public opinion pools show that

a fairly substantial majority of Americans are pro-choice on the abortion question may have given it some support in that regard.

Thus interpretation of the Constitution is very much an issue of our times. But it is a people's issue and one which we should teach our students about. Here the wisdom of the past is worth remembering. As the delegates of the Constitutional Convention trudged out of Independence Hall on September 17, 1787, an anxious woman in the crowd waiting at the entrance inquired of Benjamin Franklin, "Well, Doctor, what have we got a republic or a monarcy.?" "A republic," Franklin replied, "if you can keep it."[40] And keeping it is our responsibility. As Justice Louis Brandeis once wrote: "Those who won our independence believed... the greatest menace to freedom is an inert people, that public discussion is a political duty, and that this should be a fundamental principle of the American Government." And while there are limits to the degree we can talk ourselves into good government, informed opinion has moved government leaders in the past and can and must continue to do so. Thus despite Mr. Phelps, the Constitution must be "profaned by public discussion," and the more of it the better.

FOOTNOTES

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4. Bickel and Schmidt, Judiciary and Responsible Government, p. 17.
5. G. Edward White, The American Judicial Tradition (New York, 1976) p. 292-293.
6. Pacific States Telephone and Telegraph v. Oregon, 223 U.S. 118 (1912).
7. Bickel and Schmidt, p. 726.
8. Lochner v. New York, 198 U.S. 45 (1905).
9. Ibid., 75.
10. quoted in Smith and Murphy, Liberty and Justice, p. 331
11. Hammer v. Dagenhart, 247 U.S. 251 (1918).
12. Ibid., 280.
13. Walter Berns, "Do We Have a Living Constitution?" National Forum, Vol. LXIV, No. 4 (Fall, 1984), p. 31.
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17. 43 Stat. 936 (1925).
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28. James MacGregor Burns, "The Bicentennial Era: A Time to Think Boldly," Prologue: Journal of the National Archives, Vol. 17, No. 3 (Fall, 1985), p. 149-150.

29. 304 U.S. 64 (1938).

30. U.S. v. Carolene Products, 304 U.S. 144, 152-153 (1938).

31. Leo Pfeffer, This Honorable Court (Boston, 1965), p. 342.

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34. Bernard Schwartz, Super Chief: Earl Warren and His Supreme Court (New York, 1983), and Schwartz, ed., The Unpublished Opinions of the Warren Court (New York, 1985).

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37. G. Edward White, Earl Warren: A Public Life (New York, 1982), p. 223.

38. Stuart Taylor, Jr., "Meese v. Brennan," New Republic, Vol. 194 No. 1 & 2 (January 6, and 13, 1986), p. 17.

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40. From "Notes of Dr. James McHenry," in Documents Illustrative of the Formation of the Union of the American States (Washington, 1927), p. 83.

41. Olmstead v. U.S. 277 U.S. 438, 478-479, 485 (1928).